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No. 89-314

In The

Supreme Court of the United States

October Term, 1989

THE CITY OF NORMAN, A MUNICIPAL CORPORATION; AND **KELVIN WINTER** AND **DOUG MCKENZIE**, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY AS DULY AUTHORIZED LAW ENFORCEMENT OFFICERS FOR THE CITY OF NORMAN; AND **STEVE CAIN**, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE SUPERVISOR AND A DULY AUTHORIZED LAW ENFORCEMENT OFFICER FOR THE CITY OF NORMAN,

Petitioners,

v.

MICHAEL W. O'ROURKE, SHIRLEY M. O'ROURKE, AND **KATHLEEN O'ROURKE,**

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a bench warrant issued for failure to appear by a small claims court valid under Oklahoma law for service at night?

2. If such a warrant is valid for service at night under Oklahoma law, can a bench warrant issued for failure to appear by a small claims court be used as a basis for a nighttime search of a home incident to that warrant in the absence of exigent circumstances?

3. Can a stipulation that the Defendant City would pay the sum of $4,000.00 in damages for a finding of any civil rights violation still invoke the defense of qualified immunity?

4. If such a stipulation can still invoke the defense of qualified immunity, was the law clearly established that a bench warrant for failure to appear in a small claims case was invalid at night without a night endorsement?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PRELIMINARY STATEMENT

MICHAEL W. O'ROURKE, SHIRLEY M. O'ROURKE and KATHLEEN O'ROURKE,

Respondents in this proceeding, oppose the Petition as there is no necessity for further review of this matter. The May 23, 1989 decision of the United States Court of Appeals for the Tenth Circuit is in accord with Oklahoma law regarding warrant validity and well established and settled federal law regarding the Fourth Amendment.

Most importantly, these Petitioners have not suggested a single reason that addresses this Court's sound discretion under *Supreme Court Rule 17.1*. They simply ask this Court to reconsider the Tenth Circuit decision regarding a question of state law, a decision well-ground in Oklahoma law.[1]

They point to no substantial conflicts among the circuits requiring resolution. Since the Tenth Circuit's decision turned on a question of Oklahoma law, there is no "important question of federal law which has not been, but should be, settled by this Court," nor did the

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[1] Astoundingly enough, the interpretation Petitioners seek calls for a result that invites another violation of the Tenth Amendment. See *O'Rourke v. City of Norman*, 875 F.2d 1465, 1470 (Tenth Cir. 1989) (P. 13, Appendix A, Petition for Writ of Certiorari)(District court ignoring forty years of Oklahoma precedent in determining warrant validity was a violation of the Tenth Amendment). These municipal Defendants apparently do not understand that shortsighted efforts to reinstate the district court ruling (Not following Oklahoma law in determining the nature of contempt) would teeter the carefully crafted balance of federalism if federal courts could disregard state precedent in federal civil rights litigation.

Tenth Circuit render a "federal question in a way in conflict with applicable decisions of this Court."

Finally, they ask this Court to review the Tenth Circuit's interpretation of a stipulation of damages that presented the matter for nonjury trial and which the Circuit construed as a waiver of qualified immunity.[2] Simply put, Petitioners now seek rescue from their own judicially entered stipulation.

In short, there are no "special and important reasons" requiring the exercise of this Court's jurisdiction.

Under the right circumstances (not present here because resolution turned on consideration of state statutes and cases and elementary constitutional law), one question does suggest the essential elements for consideration under *Rule 17.1*. That question is whether a bench warrant or misdemeanor warrant for the arrest of a person can justify a search of a home incident to that warrant. These Defendants, in their Questions I and VI and by their vigorous defense of these officers,

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[2] This matter was set for jury trial on February 3, 1986. The district court struck the trial date on its own motion. The parties then stipulated to damages in the amount of $4,000.00 which would be paid to the Plaintiffs ". . in the event that Plaintiffs should prevail upon any issue of declaratory or injunctive relief. . " (R/A, Doc. 80, Order dated 2/3/86). The Tenth Circuit ruling this was an illegal, warrantless search triggered the stipulation and it ordered judgment entered in Plaintiffs' favor for the stipulated damages plus accrued interest from the date of the stipulation. *O'Rourke v. City of Norman*, 875 F.2d at 1475-6. (PP. 26-7, Appendix A, Petition for Writ of Certiorari).

concede and commit to the pernicious practice, policy, custom and procedure of nighttime searches of the homes of citizens incident to attempted execution of misdemeanor or bench warrants.

Drawing this to its logical conclusion, in the minds of police officers of the City of Norman, a misdemeanor traffic offense or the "order to appear" swings opens the door to a nighttime "recognizance"[3] through the private and personal chambers of the citizenry's homes.

Although this was the central question sought for determination when Respondents (Plaintiffs) began this litigation, the Tenth Circuit ruling that this incident was a warrantless search barred further consideration. It is an inquiry whose resolution is left to another day.

However, in the event of an acceptance of certiorari and a modification or discarding of the Tenth Circuit judgment that warrant invalidity under state law rendered the search illegal, Respondents urge this Court to affirm the decision upon the theory that a bench warrant can

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[3] At trial, Defendants presented Samuel Chapman, Professor of Political Science at the University of Oklahoma and instructor at the Norman Police Academy, who characterized the officers' actions as "performed within the context of accepted police practice." The Tenth Circuit commented, "Chapman went on to testify that the search of all of the O'Rourkes' home was not a search at all—it was merely a 'recognizance.' This is contrary to all Fourth Amendment law known to this Circuit." *O'Rourke v. City of Norman*, 875 F.2d at 1468 (PP. 7-8, Appendix A, Petition for Writ of Certiorari).

not be used as the basis for a nighttime search of a home absent exigent circumstances.[4]

Another alternative disposition would be a summary affirmance of the decision of the Tenth Circuit as a proper statement of both Fourth Amendment law and the federalism implicit under the Tenth Amendment.

OPINION BELOW

The opinion of the United States Court of Appeals is reported as *O'Rourke v. City of Norman*, 875 F.2d 1465 (10th Cir. 1989). It also appears in the Petition for Writ of Certiorari as Appendix A. It reversed in toto the judgment of the United States District Court, Western District of Oklahoma, reported as *O'Rourke v. City of Norman*, 640 F. Supp. 1451 (W.D. Okla. 1986). The district court decision appears in the Petition for Writ of Certiorari as Appendix B (pp. 11-37).

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[4] Defendant Kelvin Winter testified there were no exigent circumstances that night and the matter was routine. (Tr. 5/16/86, (Holmes), p. 95; p. 104-5). Don Holyfield, Chief of Police, and Darian DeBolt, Patrol Supervisor, testified there were no exigent circumstances. (Tr. 5/27/86, p. 35; Tr. 5/27/86, p. 129). The Tenth Circuit determined the case did not present any issues of "consent, hot pursuit or exigent circumstances." *O'Rourke v. City of Norman*, 875 F.2d at 1476 (10th Cir. 1989) (P. 28, Appendix A, Petition for Writ of Certiorari).

JURISDICTION

The judgment of the Tenth Circuit was entered May 23, 1989. No petition for rehearing was filed.

Petitioners invoked this Court's jurisdiction pursuant to 28 U.S.C. §1254(1) involving review "By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree."[5]

QUESTIONS PRESENTED

1. Is a bench warrant issued for failure to appear by a small claims court valid under Oklahoma law for service at night?
2. If such a warrant is valid for service at night under Oklahoma law, can a bench warrant issued for failure to appear by a small claims court be used as a basis for a nighttime search of a home incident to that warrant in the absence of exigent circumstances?
3. Can a stipulation that the Defendant City would pay the sum of $4,000.00 in damages for a finding of any

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[5] Jurisdiction in the District Court was invoked pursuant to 28 U.S.C. §1343(3) based on the existence of a substantial federal question occasioned by a claim of a federal cause of action under 42 U.S.C. §1983 for violation of civil rights under the Fourth and Fourteenth Amendments.

civil rights violation still invoke the defense of qualified immunity?

4. If such a stipulation can still invoke the defense of qualified immunity, was the law clearly established that a bench warrant for failure to appear in a small claims case was invalid at night without a night endorsement?

STATUTORY PROVISION

United States Code, Title 42:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284)

STATEMENT OF THE CASE

Respondents (Plaintiffs) were the subject of a nonconsensual nighttime search of their residence by Petitioner (Defendant) officers of the Norman Police Department.[6] The officers were attempting to execute a bench warrant issued for the arrest of Respondents' daughter, Deborah Boyd, arising out of a failure to appear in a small claims case.[7] Boyd was not found during the search of the O'Rourke home by the officers because she was not there.[8]

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[6] Respondents do not agree that the statement of facts presented by Petitioners is a "concise statement of the facts material to the consideration of the questions presented." *Supreme Court Rule 21(g)*. It is especially not useful because it stresses particular nonrelevant matters (*i.e.*, emphasis on the term "FORTHWITH") and fails to directly state other matters in a straightforward manner (*i.e.*, it never records that the Tenth Circuit held the nighttime search of the home was a warrantless search since the bench warrant was invalid for service at night). The factual recitations of the opinion of the Tenth Circuit in Appendix A of the Petition for Writ of Certiorari and additional facts as may be supplemented by this Respondents' Brief will suffice to sum up the factual predicates needed for this case.

[7] The small claims court had ordered Ms. Boyd to make periodic payments toward satisfaction of a judgment granted against her. When she failed to do so, the adverse party sought Ms. Boyd's punishment by contempt of court for failure to comply with the court order to pay.

[8] A substantial controversy arose as to whether or not

(continued...)

REASONS FOR DENIAL OF THE WRIT

In summary, Petitioners claim the Tenth Circuit erred in ruling that *Payton v. New York*, 445 U.S. 573 (1980) applies only to felony warrants (P. 9-10, Petition for Writ of Certiorari); *Second*, both Judge Bohanon and the Circuit erred in their rulings on the nature of the bench warrant because it is neither a felony nor misdemeanor (P. 10-12, Petition for Writ of Certiorari); *Third*, the issue regarding the nature of bench warrants should have been certified to the Supreme Court or the Court of Criminal Appeals of the State of Oklahoma; and *Fourth*, the police officers should be entitled to qualified "good faith" immunity despite a stipulation of municipal liability for a finding of "any civil rights violation."

Petitioners' first argument is simply erroneous. The second and third arguments ignore existing Oklahoma law. The fourth argument seeks a rescue of the individual Petitioners (Defendants) from their stipulation

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[8](...continued)
Respondents' residence was also the residence of Deborah Boyd. Respondents claim it was not and therefore the search was also illegal under *Steagald v. United States*, 451 U.S. 204 (1981) (Search of third party home pursuant to arrest warrant held violative of Fourth Amendment). It was not necessary to resolve this issue under the ruling by the Tenth Circuit.

and would accomplish nothing since the Defendant City, which has no qualified immunity, would still be required to pay upon a finding of a civil rights violation for its practice, policy, custom or usage. Petitioners also raise certification to the state courts for the first time in this entire proceeding.

I.

THE TENTH CIRCUIT CORRECTLY FOUND THAT OKLAHOMA LAW DEFINES CONTEMPT AS A MISDEMEANOR FOR FOURTH AMENDMENT PURPOSES AND A BENCH WARRANT FOR FAILURE TO APPEAR IS A MISDEMEANOR WARRANT REQUIRING AN ENDORSEMENT BY A MAGISTRATE FOR SERVICE AT NIGHT.

Little would be gained here by reviewing the carefully crafted opinion of the Tenth Circuit that identifies a bench warrant for "failure to appear" as a misdemeanor warrant requiring a judicial endorsement for nighttime service. To be sure, as the Circuit points out, there is some confusion in Oklahoma between the Oklahoma Court of Criminal Appeals and the Oklahoma Supreme Court, but they are in accord on the thought that contempt was not a felony in Oklahoma contrary to the district court ruling. *O'Rourke v. City of Norman*, 875 F.2d at 1470 (P. 13, Appendix A, Petition for Writ of Certiorari). The analysis under Section II(B) of the

Tenth Circuit's opinion clearly and carefully traces the evolution of contempt and the various state court decisions ignored by the district court.

While the district court foraged outside the State of Oklahoma in order to classify contempt a felony, a simple analysis of Oklahoma Statutes suggests the rationale of the Oklahoma State courts in categorizing contempt as a misdemeanor. Copies of the relevant statutes cited herein are reproduced in full in Appendix A of this Response Brief.

Not even Petitioners (Defendants) should disagree with the notion that contempt is a public offense. 21 Okla. Stat. (1910) §3 provides that a crime or public offense is an act or omission forbidden by law and to which is annexed, upon conviction, various punishments, including imprisonment and a fine. Contempt is statutorily defined.[9] 21 Okla. Stat. (1910) §565. All crimes are "divided into felonies and misdemeanors." *Magnolia Pipeline Co. v. State*, 243 P.2d 369, 380 (Okla. Cr. 1952). Generally, any offense for which ". . . the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed in any statute, the doing of such act is a misdemeanor." 21 Okla. Stat. (1910) §21. Prior to 1984, Oklahoma

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[9] It is relevant to note that Oklahoma has placed the definition for contempt and information regarding its punishment under Title 21 of its statutes entitled Crimes and Punishment. They are cataloged under Chapter 19, *Other Crimes Against Public Justice*. See 21 Okla. Stat. §565, *et seq.*

provided punishment for contempt as only a "fine or imprisonment." 21 Okla. Stat. (1981) §566. In 1984, a year after the incident at the O'Rourke home, the Oklahoma Legislature amended the contempt punishment statute to a "fine in a sum not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail not exceeding six (6) months, or by both, at the discretion of the court." 21 Okla. Stat. (1984) §566. This subsequent enactment clearly brings contempt within the category of punishment for misdemeanors. See 21 Okla. Stat. (1910) §10.

It is useful to emphasize two additional factors from the analysis by the Tenth Circuit. First, the most analogous cases cited in analyzing "contempt for failure to appear" are perhaps the *Roselle* cases. *Roselle v. State*, 503 P.2d 1293 (Okla. Cr., 1972) (*Roselle I*); *Roselle v. State*, 509 P.2d 486 (Okla. Cr. 1973)(*Roselle II*). In these cases, originating out of the District Court of Cleveland County, an attorney was charged with *contempt for failure to appear*. The Oklahoma Court of Criminal Appeals held that contempt was a misdemeanor for purposes of appeal and post conviction relief. *Roselle I*, 503 P.2d at 1295 and *Roselle II*, 509 P.2d at 488. The holding that contempt was a misdemeanor was reversed only as to direct contempt since it was treated differently procedurally from indirect contempt and there was no advantage to continuing to classify direct contempt as a crime. See *Gilbert v. State*, 648 P.2d 1226, 1230-1 (Okla. Cr. 1982). Regardless, in *Gilbert*, contempt was still "*sui*

generis" or "of a criminal nature" *i.e.* quasicriminal. *Gilbert v. State*, 648 P.2d at 1230.

Petitioners now suggest that both the Tenth Circuit and the district court were wrong[10] and by implication, a bench warrant is not limited to the daytime service of a misdemeanor, but can be executed anytime of the day or night, much like a felony.

This is tantamount to reinstating the district court ruling that contempt was a felony. More incredibly, the logical progression of this argument suggests that Petitioners urge a "civil" or "hybrid" nature for a bench warrant that has broader scope in execution than a criminal misdemeanor warrant and can be used, as

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[10] Petitioners state, "Confusion over the nature of bench warrants in Oklahoma arises out of the fact that they are not clearly defined under Oklahoma statutory law, nor has their fundamental nature ever been considered by the courts of the State of Oklahoma. Given this confusion, if it was error for Judge Bohanon to rule that bench warrants for contempt of court were felony warrants, then it was equally erroneous for the Court of Appeals to rule that they are misdemeanors." (P. 10-11, Petition for Writ of Certiorari). This position represents an unstudied view of Oklahoma statutes and cases as the Tenth Circuit analysis shows. Oklahoma law defines bench warrants issued in felonies (22 Okla. Stat. (1910) §456) and for misdemeanors or bailable offenses (22 Okla. Stat. (1910) §457). The substantial difference between the two is the inclusion of a clause permitting bail for misdemeanors and bailable offenses. Still another section provides for a bench warrant issued when a defendant fails to appear for judgment after conviction. 22 Okla. Stat. (1910) §967 (See Appendix A for citation of relevant statutes).

occurred here, as a basis for an entry into the home. This is not in accord with this Court's decisions.[11]

In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), this Court held that absent exigent circumstances, a warrantless nighttime entry into an individual's home to make an arrest for a civil, nonjailable traffic offense was prohibited by the Fourth Amendment. Central to the decision was the concept that the state's classification of the offense as civil meant that the only interest of the state was the procurement of a specimen to test Defendant's blood alcohol content. This was not a sufficient exigent circumstance to support the home invasion.

This analysis in balancing the "gravity of the offense" against the Fourth Amendment mitigates in favor of

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[11] If any condition were to create the "significant, deleterious and perhaps erroneous impact on the use of bench warrants" that Petitioners carp about in their Question VI (P. *ii*, Petition for Writ of Certiorari), this argument would do it. It would require officers to distinguish between three (or perhaps more) types of warrants and to ascertain the service requirements for each. It seems demonstrably simpler to follow a scheme where felony warrants can be executed day or night and all other warrants (including misdemeanor warrants, civil bench warrants or other similar process) can be executed only during the day unless endorsed by a magistrate. Besides, this would parallel a statutory practice Oklahoma has followed since statehood with regard to the simple distinctions between felony and misdemeanor warrants. No serious effect can result if bench warrants and other similar process are treated similar to misdemeanors.

excluding the Petitioner police officers from the O'Rourke home, not, as Petitioners suggest, in favor of an invasion of the home. As much was recognized by the Tenth Circuit. *O'Rourke v. City of Norman*, 875 F.2d at 1471 (P. 16, Appendix A, Petition for Writ of Certiorari) ("The classification of contempt as *sui generis* does not vitiate this requirement, it strengthens it.").

In summary, there is substantial authority under Oklahoma law to support the Tenth Circuit view of Oklahoma law that contempt for failure to appear was, for Fourth Amendment purposes, a misdemeanor for which a bench warrant required a nighttime endorsement. Identification of a civil, nonjailable offense, under the decisions of this Court, mitigates in favor of greater protection within the home of the O'Rourkes.

II.

THE LANGUAGE OF PAYTON V. NEW YORK CITED BY PETITIONERS IS DICTUM AND REFERS TO A FELONY WARRANT. ENTRY INTO A HOME IS NOT JUSTIFIED BY THE EXISTENCE OF A MISDEMEANOR WARRANT.

Payton v. New York involves a warrantless, nonconsensual entry into a home for the purpose of making a routine felony arrest in the absence of exigent circumstances. Petitioners make a recitation regarding an "arrest warrant" at Page 10 of their Petition, but it is unreferenced as to where, in the holding of *Payton*, it

appears. Since *Payton* is a warrantless felony arrest, there is no portion of that holding that references an "arrest warrant." There is, however, dictum in *Payton* that discusses home entry with a felony arrest warrant. The Tenth Circuit referenced it in the quotation from its opinion recited by Petitioners at Page 9 of their Petition for Writ of Certiorari.

The dictum appears toward the end of this Court's opinion in *Payton*. If this be their reference, Petitioners are simply incorrect when they state the reference to arrest warrant is not limited to a felony warrant. The entire quotation is:

> If there is sufficient evidence of a citizen's participation in a **felony** to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an **arrest warrant** founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. (emphasis added)
>
> *Payton v. New York*, 445 U.S. at 602-3

As a threshold point, it should be remembered the Tenth Circuit held the search here was warrantless

because the bench warrant was invalid at night under state law.[12]

But, even if that question were not present, there is authority from within the contours of *Payton* as well as *Welsh v. Wisconsin*, 466 U.S. 740 (1984) that compels consideration of the "gravity of the offense" as an important part of the calculus of determining under what circumstances a warrantless entrance into a home may occur. *Welsh* involved a warrantless, nighttime entry into a home to arrest a defendant suspect involved in a car accident. This Court held that entry into the home could not be made for a civil, nonjailable offense.

Payton dwells on the felony aspects of its holding, but discusses many civil and minor offense cases in its footnotes. For example, at Footnote 43, the Court quotes the 13th Yearbook of Edward IV (1461-1483), at folio 9, ". . there is a recorded holding that it was unlawful for a sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party."

Footnote 45 in *Payton* quotes Lieber in his work on *Civil Liberty and Self-Government*, 62, speaking of the English law in this respect, "no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony, and

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[12] This Court has recognized as "a basic principle of Fourth Amendment law," that searches and seizures inside a home without a warrant are presumptively unreasonable. *Payton v. New York*, 445 U.S. at 586.

then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon."

And finally, no brief historical tour of the footnotes would be complete without reference to Footnote 12 in *Welsh* which specifically identifies the gravity of the offense as a significant issue before Fourth Amendment values may be impinged:

> Even the dissenters in *Payton*, although believing that warrantless home arrests are not prohibited by the Fourth Amendment, recognized the importance of the felony limitation on such arrests. . . (White, J., dissenting) ("The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most serious crimes." (Citation omitted)

Welsh v. Wisconsin, 466 U.S. 740, at Footnote 12.

In short, the gravity of the offense is a significant factor and Respondents contend that either a bench warrant or a misdemeanor warrant will not support a search of a home incident to that warrant. If "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *Payton v. New York*, 445 U.S. at 585-6, then this case is a classic example of how to transform a bench warrant or misdemeanor warrant into the "general warrant" so

dreaded by the founding fathers. Just like this Court's consideration in *Steagald* that the use of an arrest warrant for third party home searches creates a "significant potential for abuse" and "may serve as the pretext for entering a home in which police have a suspicion, but not probable cause to believe that illegal activity is taking place," *Steagald v. United States*, 451 U.S. at 215, so does the pernicious policy of entry into the home incident to a misdemeanor or bench warrant create that same "potential for abuse." The governmental interest in the apprehension of misdemeanants is not outweighed by the special protections of the Fourth Amendment. To the extent Petitioners suggest cases that permit this invasion, it is Respondents' position they are wrongly decided.

Here, police officers used the flimsiest of probable cause coupled with a minor offense to achieve an entry into the home of the O'Rourkes. They found nothing. Such a case can only be addressed by a civil rights action because there was no other ongoing proceeding to which the O'Rourkes were a party where they could air their complaint of invasion. The officers could return numerous times with "probable cause," enter the home and, if they find nothing, still not make a return on the warrant and the "principal evil of physical entry into the home" continues. Thus the execution of misdemeanor and bench warrants in a home search context parallels the general warrant so unpopular during the days prior to the Republic.

III.

THESE DEFENDANTS ENTERED INTO A STIPULATION FOR A SPECIFIED AMOUNT OF DAMAGES WHICH, IN EFFECT, WAS A WAIVER OF QUALIFIED IMMUNITY. REGARDLESS, THE LAW OF WARRANT INVALIDITY FOR NIGHTTIME SERVICE WAS CLEARLY ESTABLISHED.

Petitioners suggest that Respondents (Plaintiffs) did not raise the issue of qualified immunity waiver on appeal, yet cite to the argument raised in Plaintiffs-Appellants' Brief-in-Chief (P. 7, Petition for Writ of Certiorari). Not only did the Respondents raise the question of qualified immunity in the Court of Appeals, they also asserted in the district court that the effect of the damage stipulation was a waiver of qualified immunity.[13] (R/A, Doc. 89, filed 2/20/86, pp. 27-30).

Petitioners now seek rescue from this Court from their willful, judicially entered stipulation. There is no substantial merit to a request for the use of this Court's limited judicial resources to review a unique and factually

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[13] On the day of the stipulation on February 3, 1986, Judge Bohanon ordered additional briefing on several issues, including qualified immunity. In their Supplemental Trial Brief, Respondents (Plaintiffs) asserted and argued in Proposition VIII that the stipulation of damages constituted a waiver of qualified immunity. (R/A, Doc. 89, filed 2/20/86, pp. 27-30).

limited case which exposes Petitioners to a maximum liability for damages of only $4,000.00 plus interest.

Besides, the stipulation provided a substantial advantage to Petitioners at the time of its entry. They obtained a waiver of jury trial in exchange for a limitation of liability.[14] As the Circuit points out, Petitioners chose not to abandon the stipulation even through the time of filing of appellate briefs. *O'Rourke v. City of Norman*, 875 F.2d at 1475 (P. 27, Appendix A, Petition for Writ of Certiorari). Though not reflected in the record, a question was directed from the panel at oral argument asking if both parties still agreed to the stipulation. The Circuit found the stipulation acted, in effect, as a waiver of qualified immunity. It is also, in effect, an admission that the home search here was a

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[14] The certainty of a stipulated damage amount can be an advantage when weighing possible risks with a jury. In hindsight, and in consideration of the district court ruling in this case, it was no gamble and an early significant advantage to Petitioners. But there are better examples of the inherent risks. For example, a recent Tenth Circuit case affirmed an award totalling $235,000.00 arising out of an alleged unlawful search of a home and office. *Specht v. Jensen*, 832 F.2d 1516 (10th Cir. 1987). Factually, the cases are very similar. Although certain threats were made by the officers, no apparent physical injuries resulted. While there is a difference regarding the proof of damages between *Specht* and *O'Rourke*, there is, nonetheless, an intriguing contrast that makes a stipulation of damages of $4,000.00 appear paltry, at best. No doubt, in consideration of the final result, counsel for Jensen would probably have traded a jury trial for a stipulation of $4,000.00 damages.

policy. Regardless of the stipulation, as has been argued herein (and as shown by the Tenth Circuit's analysis of Oklahoma law), the requirement for a "day or night" endorsement for nighttime service of a bench warrant was clearly established by Oklahoma law. Although there may not be a singular case that shows that bench warrants require night endorsement in Oklahoma, overall there is sufficient guidance since ". . . in light of preexisting law the unlawfulness (is) apparent."[15] *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039 (1987)

Petitioners also assert these officers are entitled to a "qualified good faith immunity" when they perform their duties in reliance on their training and procedures of the governmental entity to which they are responsible[16] (P.

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[15] Even if we apply the "reasonable officer standard" to these individual Defendants, they still flunk the test. The illegality of the bench warrant for nighttime service was recognized by Darian DeBolt, their Patrol Supervisor, in his investigation of the incident. "Captain DeBolt declared the search of the O'Rourke home illegal because the *warrant was improperly served in the nighttime*." *O'Rourke v. City of Norman*, 875 F.2d at 1469; P. 9, Appendix A, Petition for Writ of Certiorari) (emphasis added).

[16] This argument by Petitioners is tantamount to an admission that the officers' actions were in accordance with a policy, practice, custom or usage of the Defendant City since training is, in its purest form, the official policy of the City. The failure to train police officers to require night endorsements for bench warrants could amount to gross negligence in training, thereby warranting liability. *City of Canton, Ohio v. Harris*, 489 U.S. ____, 103 L.Ed. 412 (1989).

14-5, Petition for Writ of Certiorari). This, does not, however, fit the objective calculus of qualified immunity. The officers' subjective expectations regarding their training and the lawfulness of their acts are irrelevant to an analysis of qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. at 3040. To that extent, Petitioners' assertions are a misstatement of the law of qualified immunity. Besides, even if they did rely on their training, a longtime, widespread practice is not immune from constitutional scrutiny. *Payton v. New York*, 445 U.S. at 600.

Finally, it is necessary to address the relevance, if any, of the presence of the word "FORTHWITH"[17] on the Bench Warrant. (Questions Presented II and III and Pages 4 and 10, Petition for Writ of Certiorari). Petitioners claim, in effect, that the singular presence of this word on the warrant and its invocation of immediacy can sweep away the protections of the Fourth Amendment, neutralize other state statutory protection schemes and immunizes the officers from concern over a nighttime service.

Petitioners' suggestion borders on the frivolous, if not the ridiculous. The word "forthwith" is a term of art with

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[17] There is only one statutory section which defines a criminal arrest warrant. 22 Okla. Stat. (1910) §172. This same form is used for both felony and misdemeanor warrants. As an aside, "Forthwith" is not capitalized in this Oklahoma statutory form nor was it on the Bench Warrant for Boyd. §172 is reproduced in its entirety in Appendix A to this Brief in Response.

limited relevance or relationship to the distinction between daytime versus nighttime warrant service. Under the Oklahoma statutory form for warrants, both felony and misdemeanor arrest warrants contain the word "forthwith." 22 Okla. Stat. (1910) §172 (See Appendix A). Not surprisingly, there is no requirement in 22 Okla. Stat. (1910) §189 (or any other statute for that matter) that requires the form of the warrant be modified to remove the word "forthwith" for a daytime only warrant.

There are three statutory forms for bench warrants under Oklahoma Law: 22 Okla. Stat. (1910) §456 (Form of bench warrant for a felony); 22 Okla. Stat. (1910) §457 (Form of bench warrant for a misdemeanor or bailable felony); and 22 Okla. Stat. (1910) §967 (Form of bench warrant for a failure to appear after judgment when personal attendance is necessary) (See Appendix A). **All three** (including the misdemeanor bench warrant) include the word, "forthwith" in their text. It is reasonable to conclude that the statutory scheme contemplates a distinction between day and night service without unnecessary emphasis on the term, "forthwith."

A comparison between the Bench Warrant for Deborah Boyd (Appendix C, Petition for Writ of Certiorari) and the statutory sections cited shows it most closely parallels 22 Okla. Stat. §457, the form for a misdemeanor or bailable felony.

To suggest that "forthwith" means an arrest can take place any time of the day or night is to suggest that this single word repeals the protection of §189 which requires a "day or night" endorsement for misdemeanor warrants.

In summary, if there is a distinction of relevance, it is not explicit under Oklahoma law.

CONCLUSION

For the reasons and argument provided herein, Michael O'Rourke, Shirley M. O'Rourke and Kathleen O'Rourke, respectfully request that certiorari be denied.

In the event of acceptance of certiorari and modification or discarding of the Tenth Circuit judgment that warrant invalidity under state law rendered the search illegal, Respondents urge this Court to affirm the decision based upon the theory that a bench warrant can not be used as the basis for a nighttime search of a home absent exigent circumstances.

Alternatively, Petitioners seek summary affirmance of the decision of the Tenth Circuit as a proper statement of both Fourth Amendment law and the federalism implicit under the Tenth Amendment.

Respectfully submitted,

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APPENDIX

APPENDIX A - Text of relevant Oklahoma Statutes.

APPENDIX A

The following are relevant Oklahoma Statutes cited in the text of this Response Brief:

Title **21 Okla. Stat.** (1910) **§3.** *Crime and public offense defined*

> A crime or public offense is an act or omission forbidden by law, and to which is annexed, upon conviction, either of the following punishments:
>
> 1. Death;
> 2. Imprisonment;
> 3. Fine;
> 4. Removal from office; or,
> 5. Disqualification to hold and enjoy any office of honor, trust, or profit, under this state.

Title **21 Okla. Stat.** (1910) **§10.** *Punishment of misdemeanor*

> Except in cases where a different punishment is prescribed by this chapter or by some existing provisions of law, every offense declared to be a

misdemeanor is punishable by imprisonment in the county jail not exceeding one (1) year or by a fine not exceeding Five Hundred Dollars ($500.00), or both such fine and imprisonment.

Title **21 Okla. Stat.** (1910) **§21**. *Prohibited act a misdemeanor, when*

Where the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed in any statute, the doing of such act is a misdemeanor.

Title **21 Okla. Stat.** (1910) **§565**. *Contempts, direct and indirect–Definition*

Contempts of court shall be divided into direct and indirect contempts. Direct contempts shall consist of disorderly or insolent behavior committed during the session of the court and in its immediate view, and presence, and of the unlawful and willful refusal of any person to be sworn as a witness, and the refusal to answer any legal or proper question; and any breach of the peace, noise or disturbance, so near to it as to interrupt its proceedings, shall be deemed direct contempt of court, and may be summarily punished as hereinafter provided for. Indirect

contempts of court shall consist of willful disobedience of any process or order lawfully issued or made by court; resistance willfully offered by any person to the execution of a lawful order or process of a court.

Title **21 Okla. Stat.** (1981) **§566.** *Punishment*

Punishment for contempt shall be by fine or imprisonment, or both, at the discretion of the court.

Title **21 Okla. Stat.** (1984) **§566.** *Punishment*

Unless otherwise provided for by law, punishment for direct or indirect contempt shall be by the imposition of a fine in a sum not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail not exceeding six (6) months, or by both, at the discretion of the court.

Title **22 Okla. Stat.** (1910) **§172.** *Form of warrant*

A warrant of arrest is an order in writing, in the name of the State, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

County of _____
The State of Oklahoma,

To any sheriff, constable, marshal or policeman in this State (or in the county of _____ as the case may be):

Complaint upon oath having been this day made before me that the crime of (designating it) has been committed, and accusing C.D. thereof, you are therefore commanded forthwith to arrest the above named C.D. and bring him before me at (naming the place), or, in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at _____ this _____ day of _____, 191___.

E.F., Justice of the Peace (or as the case may be.)

Title **22 Okla. Stat.** (1910) **§189.** *Arrest, when made*

If the offense charged is a felony, the arrest may be made on any day, and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate indorsed upon the warrant.

Title **22 Okla. Stat.** (1910) **§456.** *Bench warrant, form of, in case of felony*

The bench warrant must, if the offense is a felony, be substantially in the following form:

County of . . . . . .
State of Oklahoma

To any Sheriff, constable, policeman, or marshal in this State:

An indictment having been found (or information filed) on the . . . . day of . . . . . A.D., 19 . . ., in the district court in and for the county of . . . . . , charging C.D. with the crime of . . . . . ., (designating it generally) you are therefore commended forthwith to arrest the above named C.D., and bring him before the court (or before the court to which the indictment or information may have been removed, naming it) to answer said indictment or information; or if the court have adjourned for the term, that you deliver him into the custody of the sheriff of the county of . . . . . .

Given under my hand, with the seal of said court affixed this . . . . . day of . . . . . A.D., 19. . . .

By order of the court.

E. F., Clerk.

(Seal)

Title **22 Okla. Stat.** (1910) **§457.** *Bench warrant in case of misdemeanor or bailable felony*

If the offense is a misdemeanor or a bailable felony, the bench warrant must be in a similar form, adding to the body thereof a direction to the following effect:

Or, if he requires it that you take him before any magistrate in that county or in county in which you arrest him, that he may give bail to answer the indictment or information.

Title **22 Okla. Stat.** (1910) **§967.** *Form of bench warrant*

The bench warrant must be substantially in the following form:

County of . . . . . .
State of Oklahoma.

To any sheriff, constable, marshal or policeman in this state:

A.B. having been, on the . . . . day of . . . . ., A.D., 19. . ., duly convicted in the . . . . . court of the county of . . . . . of the crime of (designating it generally), you are therefore commanded forthwith to arrest the above named A B and bring him before that court for judgment, or if the court has adjourned for the term, you are to deliver him into the custody of the sheriff of the county of . . . . . (as the case may be).

Given under my hand, with the seal of said court affixed, this . . . . day of . . . . . A.D., 19 . . .

By order of the court.

E. F., Clerk

(Seal.)